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Attorneys for Z4 Corporation

OFFICE OF PUBLIC ACCOUNTABILITY

PROCUREMENT APPEAL

IN THE APPEAL OF)	COMMENTS ON THE AGENCY
)	REPORT
Z4 CORPORATION)	
)	Docket No. OPA-PA-09-012
Appellant.)	
_____)	

INTRODUCTION

COMES NOW Z4 Corporation (“Z4”) who submits its Comments on the Agency Report in response to the Agency Report filed by the General Services Agency (the “GSA”) on December 9, 2009 regarding the Invitation for Bid No.: GPSS 008-2009 (Re-Bid) (“IFB”), which is the subject of the instant appeal.

This appeal is about one issue: whether Eons provided an adequate explanation of the terms of its Alternate bid. If Eons did not provide a full explanation, which it did not, then Eons’ Alternate bid was properly rejected and the IFB lawfully awarded to Z4. Despite the focus of GSA, this appeal is not about Z4’s submission of a performance bond or whether the IFB was actually awarded to Z4. GSA’s arguments on

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these two issues should be given little attention as they are easily debunked and are simply distractions.

Eons was given multiple opportunities to simply explain what products and services were being offered in the Alternate bid, in order for the project architect, Taniguchi Ruth Makio Architects (“TRMA”), to determine whether the Alternate bid met the specification of the IFB. Yet despite additional unfair and unlawful opportunities to explain the terms of the Alternate bid afforded to Eons by GSA, at no point did TRMA approve the Alternate bid. To the contrary, TRMA *repeatedly held* that the explanation of the Alternate bid was “inadequate” and the products offered were “unacceptable.”

Even after Eons was unable to secure the approval of TRMA, GSA issued the Notice of Intent of Possible Award to Eons based upon Eons’ unsupported assurance that “all the materials shall comply with the Technical Specifications.” Needless to say, this hollow assurance does not meet the requirements of the IFB and cannot support an award of the IFB.

It is in the best interests of Guam to affirm the award to Z4 as Z4 is the lowest responsive bidder because Eons’ *Alternate bid does not meet the specifications of the IFB*. As held by TRMA, the products offered by Eons are not acceptable for use on Guam. Accordingly, these products will likely fail within a few years, or after the next typhoon. Awarding the IFB to Eons will increase the cost to the Territory in the near future, because the products offered by Eons will likely need replacement.

Under two separate provisions, the IFB very clearly and unambiguously states that the Bidder “shall explain fully” the products offered in an Alternate bid. Since Eons has repeated failed to fully explain the terms of the Alternate bid, no award of the

IFB can be made to Eons. Therefore, the OPA should find that Eons Alternate bid was lawfully rejected and uphold that award of the IFB to Z4.

STATEMENT OF FACTS REVEALED BY THE PROCUREMENT RECORD

The Procurement Record and the Agency Report have revealed that GSA and Eons engaged in unlawful procurement activities during the appeal of Eons to the OPA. In addition, these documents revealed that Eons was provided several additional opportunities to submit information regarding the products in the Alternate bid to fully explain whether these products met the specifications of the IFB. However, these documents show that despite these unlawful advantages, Eons never obtained the approval of TRMA because the Alternate bid does not meet the specifications of the IFB.

Despite the mandatory stay of procurement activities during an appeal to the OPA, GSA afforded Eons multiple opportunities to submit additional information to fully explain its Alternate bid. On September 9, 2009, in the midst of Eons' appeal to the OPA, GSA permitted Eons to submit additional information to "clarify [Eons] bid submission." *See* Agency Report, Exhibit 20. GSA indicated that the request was being sent in "regards to the above bid and our meeting today." *Id.* The request was made regarding numerous products because the explanation originally provided was "incomplete, not translated in English, or *otherwise inadequate for the level of review needed for approval.*" *Id.* (Emphasis Added).

Nonetheless, despite this additional opportunity to explain the Alternate bid, Eons failed to gain the approval of the project architect. On September 11, 2009, as requested, Eons submitted additional information regarding the questionable products in the Alternate bid. *See* Agency Report, Exhibit 21. However, upon review of the additional

information submitted, TRMA *again* found that the information submitted was “inadequate” and “unacceptable” *for every questioned product* in the Alternate bid. *See* Agency Report, Exhibit 22. Specifically, concerning the roof coating, TRMA stated that “past experience with [the product] has shown that they breakdown quickly under the Guam UV conditions” and “we believe the substitution does not meet the specifications.” *Id.* In addition, regarding the overhead coiling doors, TRMA stated that the “door submitted is *grossly undersized for Guam wind load conditions and will not meet the specification.*” *Id.* at p. 2 (emphasis added). As for the other products, TRMA noted that the information provided by Eons is “insufficient” and noted that the products are “unacceptable.” *Id.*

Yet, despite this failure of Eons, GSA afforded Eons *another opportunity* to submit *additional* information to fully explain the terms of its Alternate bid. On September 18, 2009 GSA noted the comments by TRMA and instructed Eons to “please provide the additional information.” *See* Agency Report, Exhibit 22. In response, Eons simply stated that “we will be completing the additional submittals required which is subject for final approval of the DOE/A&E, if the project is awarded to us.” *See* Agency Report, Exhibit 23 at p. 2. In other words, Eons proclaimed “just award us the project, and everything will be ok.”

For reasons unknown, after this second failure GSA *again* sought to accommodate Eons’ Alternate bid, which has repeatedly been found to be unacceptable by the architect for the project. On October 7, 2009, the GDOE approved the Alternate bid; however, this approval was *conditioned upon the unsubstantiated assurance* by Eons’ that the materials in the Alternate bid are in compliance with the specifications of the IFB.

See Agency Report, Exhibit 25. Accordingly, on October 8, GSA simply required Eons to give its word, without further explanation or supporting documentation, and “confirm that all materials shall comply with the Technical Specifications at no additional cost.” See Agency Report, Exhibit 26.

At no point has TRMA provided is required approval for Eons’ Alternate bid. Further, the GDOE only approved the Alternate bid conditioned upon Eons’ unsupported assurance that the Alternate bid met the specifications of the IFB. Needless to say, such unsupported assurance does *not meet the requirements of the IFB and CANNOT support an award of the IFB to Eons.*

ANALYSIS

I.

AT NO POINT HAS EONS PROVIDED AN ADEQUATE EXPLANATION OF THE ALTERNATE BID

The crux of this appeal is whether Eons’ Alternate bid was properly rejected by the GDOE for failing to fully explain the terms of its Alternate bid. Z4 maintains that Eons’ Alternate bid was properly rejected because several actors found the Alternate bid did not comply with the specification of the IFB, and such failure is grounds for rejection. Primarily, under two separate provisions of the IFB, Eons was warned that failing to fully explain the Alternate bid and failing to provide supporting documentation would result in rejection of the bid. First, under Paragraph 9 of the General Terms and Conditions, the IFB states that “**Failure to explain [the Alternate bid] will result in rejection of the bid.**” (Emphasis in original). Second, under Paragraph 20, the IFB states that “rejection of the Bid will be required if the descriptive literature(s) do not show that the product(s)

offered conform(s) to the specifications and other requirements of this solicitation.” The IFB clearly holds that the explanation requirements are *mandatory* and cannot be waived.

At no point has Eons *fully* explained whether the material and products offered in the Alternate bid meet the specifications of the IFB. Therefore, the GDOE properly rejected Eons’ Alternate bid. See In the Appeal of Dick Pacific Co., Ltd., Appeal No. OPA-PA-07-007 (upholding the rejection of bid that did not comply with the requirements of the solicitation where bidder was expressly warned that failure to supply information is grounds for rejection).

However, GSA argues in the Agency Report that the GDOE erroneously disqualified the Alternate bid submitted by Eons because “Eons Enterprises did explain and justified what they were offering on their alternate bid.” Agency Report at p. 1. In support of this statement, GSA mysteriously notes that “this fact was confirmed by GDOE’s architect on this project.” Agency Report at p. 1. But, GSA does not point to any document in the Procurement Record to support this statement, likely because none exist.

Eons was given multiple opportunities to fully explain the terms of its Alternate bid. However, contrary to the representations of GSA, the Procurement Record clearly demonstrates that neither GSA, the GDOE nor TRMA ever held that: (1) Eons fully explained the products offered in its Alternate bid; or (2) Eons’ Alternate bid was acceptable. Quite the opposite, TRMA *repeatedly* held that explanation provided by Eons was “inadequate” and the questioned products were “unacceptable.” As demonstrated below, each proffered explanation was correctly dismissed as inadequate. Accordingly, the Alternate bid of Eons was properly rejected and cannot support an award.

A. **The Alternate Bid of Eons Did NOT Contain an Adequate Explanation at the Opening of the Bids**

Primarily, in the Agency Report, GSA does not dispute Z4 that Eons failed to submit an adequate explanation of the Alternate bid. Further, GSA does not dispute that TRMA initially reviewed the Alternate bid of Eons and found that it was “inadequate for the level of review required for approval.” *See* Grounds for Appeal at p. 6, Exhibit 14. GSA also does not challenge the numerous unexplained differences between Eons’ Basic and Alternate bid, *including the drastic reductions in the pricing for labor*, as noted in Z4’s Grounds for Appeal. Accordingly, it is not disputed that Eons did not provide an adequate explanation at the time of opening.

B. **The “Explanation” Submitted by Eons in Support of its Own Appeal Did NOT Fully Explain the Terms of the Alternate Bid AND Was Not Submitted At the Opening of the Bids**

In this very same matter, Eons submitted an appeal to the OPA after the GDOE rejected its Alternate bid for failing to fully explain the Alternate bid. In this appeal, Eons argued to the OPA that it did fully explain the Alternate bid, and in support of its argument, Eons submitted a document entitled “Explanation.” *See* Grounds for Appeal, Exhibit 8. Eons argued that this document provided the explanation for the Alternate bid.

However, the Procurement Record has revealed that this so called “Explanation” was never submitted with Eons’ Alternate bid, at the opening or anytime thereafter. Thus, the *document which Eons itself claims* provided a full explanation for the Alternate bid, *and would support any award of the IFB to Eons*, was NOT even part of its bid submittal. Moreover, in the Agency Report, GSA also *does not even dispute that*

Eons failed to submit this Explanation at the opening of the bids, even though this document was the backbone of Eons' appeal to the OPA.

Finally, GSA also does not dispute that this "Explanation" failed to fully explain the products and services offered in the Alternate bid. This "Explanation" does offer some limited information regarding Eons' Alternate bid. Nonetheless, GSA does not dispute that this Explanation failed to account for over \$105,000.00 of supposed savings between Eons' Basic and Alternate bid, as noted in Z4's Grounds for Appeal. Thus, it is not disputed that this "Explanation" is inadequate was not submitted at the bid opening.

C. Eons' Untimely and Unlawful Explanations Were "Inadequate"

For the first time, GSA discretely acknowledges in the Agency Report that Eons submitted additional information explaining the products offered in the Alternate bid, which was submitted long after the opening of the bids.¹ However, GSA failed to mention that TRMA also evaluated these submittals and found they were "inadequate" and the question products were "unacceptable."

On September 9, 2009, during the statutorily imposed stay of procurement activities, GSA met with officials from Eons, and thereafter *requested* Eons submit additional information to "clarify [Eons] bid submission." *See* Agency Report, Exhibit 20. TRMA thereafter evaluated Eons' Alternate bid and, once again, found that the information submitted was "inadequate" and "unacceptable" *for every questioned product* in the Alternate bid. *See* Agency Report, Exhibit 22.

¹ The submission of these documents were untimely and unlawful as stated in Section II of this document.

Yet, for reasons unknown, on September 18, 2009, GSA again provided Eons yet another opportunity to explain the Alternate bid. Unsurprisingly, Eons was again unable to offer any meaningful information to fully explain whether all the products offered in the Alternate bid complied with the specifications of the IFB. Instead, Eons simply stated that “we will be completing the additional submittals required . . . if the project is awarded to us.” *See* Agency Report, Exhibit 23 at p. 2. Therefore, the untimely and unlawful explanations did not render the Alternate bid acceptable.

D. Eons “Confirmation” was Insufficient

In the Agency Report, GSA argues that Eons confirmed that all of the materials complied with the technical specifications at no additional cost. However, the circumstances behind this “confirmation” are troubling. For mysterious reasons, GSA desperately sought to accommodate the Alternate bid of Eons *after* TRMA found that the Alternate bid was unacceptable, *for the second time*.

On October 8, 2009, GSA issued the “Notice of Intent of Possible Award” to Eons. *See* Agency Report, Exhibit 26. In the Notice, GSA requested that Eons “confirm that all materials shall comply with the Technical Specifications.” *Id.* Thereby, GSA simply required Eons to give its word, *without further explanation or supporting documentation*, that the Alternate bid met the specifications of the IFB. Clearly, this “confirmation” is in blatant disregard of the terms of the IFB which require supporting documentation and a full explanation.

GSA’s attempt to use this “confirmation” to justify an award to Eons demonstrates the arbitrary and capricious manner in which GSA has conducted this

procurement. Why did GSA accept Eons' Alternate bid on the unsupported word of Eons? It is beyond dispute that this "confirmation" cannot render the Alternate bid acceptable.

II.

NEITHER TRMA NOR THE GDOE HELD THAT EONS' ALTERNATE BID WAS FULLY EXPLAINED

GSA claims that Eons "did explain and justified what they were offering on their alternate bid. This fact was confirmed by GDOE's architect on this project." *See Agency Report* at p. 1. This statement by GSA is puzzling and has no basis in the record. As noted above, TRMA repeatedly held that the explanations of the products offered in the Alternate bid were "inadequate" and the products offered in the Alternate bid were "unacceptable." *See Agency Report, Exhibits 7 and 22. At no point has TRMA provided its required approval for the Alternate bid of Eons.*

Also puzzling, in the Agency Report GSA supports the proposition that Eons fully explained the Alternate bid by citing to a July 27, 2009 memorandum from the "Facilities Manager" of the GDOE. *See Agency Report, Exhibit No. 8, p. 1.* GSA states that Facilities Manager found that "both the alternate bid submitted by Eons and the basic bid submitted by Z-4 could complete the project as required." *Id.* GSA thus concludes that Eons' bid was erroneously disqualified as failing to explain the terms of the bid.

However, GSA's argument is misleading at best and disingenuous at worst, because GSA fails to cite *the entire sentence from this statement*, which reads in full: "Furthermore, ***based on the assessment of the existing manpower and financial capability*** of these contractors, it is our belief that they could complete the project as required." *Id.* In other words, the Facilities Manager simply found that Eons, as a company, could

complete a project of this nature, which is not in dispute. This assessment has no bearing on the issue at hand: whether the Alternate bid of Eons complies with the specifications of the IFB, which it does not.

Finally, contrary to the assertions of GSA, the GDOE never held that Eons fully explained the Alternate bid on October 7, 2009, or that the Alternate bid met the specifications of the IFB *on its own*. Rather, on October 7, the GDOE suggested that Eons submit a “confirmation letter” providing assurance that the materials *would* meet the specifications of the IFB. Thus, the GDOE simply provided its approval for the award to Eons *conditioned upon the assurance that the Bid would meet the specification of the IFB*. Clearly, such *conditional approval* does not meet the requirements of the IFB.

III.

GSA UNLAWFULLY PERMITTED EONS ADDITIONAL OPPORTUNITIES TO EXPLAIN THE ALTERNATE BID

As stated above, Eons failed to provide an adequate explanation of the Alternate bid at any time. However, if the OPA finds, for whatever reason, that Eons did properly explain the terms of the Alternate bid, the explanation was untimely under the terms of the IFB and unlawful under the Procurement law. In any event, GSA’s actions in this regard demonstrate the arbitrary and capricious manner in which it has conducted this procurement; and at worst, it demonstrates GSA’s bad faith.

1. GSA Requested Eons Submit Untimely Documentation

The IFB clearly states all documentation supporting or explaining a bid submission “must be furnished as a part of the bid and *must be received at the date and*

time set for opening Bids.” See Agency Report, Exhibit 2, IFB General Terms and Conditions at ¶20. No provision allows a bidder the opportunity to later supplement a bid.

However, as stated above, on two separate occasions, GSA allowed and *even requested* that Eons submit additional documentation to explain the terms of the Alternate bid, after the opening of the bids. See Agency Report, Exhibits 20 and 23. Thus, GSA blatantly disregarded the terms of the IFB and permitted Eons additional opportunities to support its Alternate bid. Even though Eons was unable to take advantage of this opportunity, GSA clearly provided Eons with an advantage over the other bidders.

2. **GSA Unlawfully Allowed Eons to Submit Subsequent Explanations**

Under the Procurement Law of Guam, in the event of a timely protest “the Territory *shall not proceed further with the solicitation* or with the award of the contract prior to final resolution of such protest, *and any such further action is void.*” 5 G.C.A. § 5425(g). Despite the mandatory stay of procurement activities during an appeal to the OPA, GSA continued the procurement process for the IFB and allowed and even requested Eons submit additional information to support and modify its bid submittals. Such actions are in blatant disregard of the Procurement Law and reek of bad faith. Moreover, such actions are void and cannot save the Alternate bid of Eons.

II.

THE IFB WAS AWARDED TO Z4; HOWEVER, EVEN IF IT WAS NOT, ANY SUPPOSED AWARD TO EONS WAS UNLAWFUL

GSA apparently realizes that it cannot simply revoke a lawful award and, thus, GSA clings to the untenable position that “no award has been made to Z4.” See Agency Report at p. 2. However, GSA offers no justification or support for this statement

or otherwise explains how the “Notice to Proceed” issued to Z4 does not constitute an award, which provided: “as agreed, *you are hereby notified to commence work on the above contract on August 10, 2009.*” See Grounds for Appeal, Exhibit 4. The only reasonable interpretation of the Notice to Proceed is that an award was made.

Further, GSA goes a step further and claims that no preconstruction meeting was ever held. This statement demonstrates it is clear that GSA is unaware of the procurement activities that have transpired in this IFB. As evidenced by the attached Declaration of Pete Valencia, and confirmed by Exhibit 5 of Z4’s Grounds for Appeal, at the request of the GDOE, Z4 officials attended the Pre-Construction meeting with officials from the GDOE and TRMA. See Valencia Declaration at ¶ 3-6; Exhibit 22. The meeting was further memorialized by the “Minutes of Meeting,” which indicated that the parties discussed the further performance of the project, as required by the IFB “*after award.*” See Agency Report at p. 2.

As stated above, the issue of this appeal is whether Eons fully explained the products offered in the Alternate bid in order to support an award. Even if the IFB was not awarded to Z4, this would not affect this appeal. If the OPA finds that there was no award to Z4, then the OPA should find that the IFB *should have been awarded to Z4*. The bottom line is that *the Procurement Record cannot possibly support an award to Eons*.

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III.

SUBMISSION OF THE PERFORMANCE BOND WAS NOT YET REQUIRED

In the Agency Report, GSA faults Z4 for failing to submit a performance bond. *See* Agency Report at p. 1. GSA claims that the “law requires the submission of the performance bond, not an open extension to gather one.” *Id.*

A. The Performance Bond is Due Upon Execution of the Contract

According to the Procurement Law, as quoted by GSA, the performance bond is due “at the same time the contract is executed.” *Id.* In other words, the trigger date for the submission of the performance bond is the date upon which the formal contract is to be executed. GSA does not allege that the formal contract was due to be executed or that GSA ever attempted to arrange for the execution of the formal contract. Thus, since the performance bond was due upon execution of the contract, Z4 was not late in the submission of the performance bond. Therefore, the failure to submit a performance bond cannot support the revocation of an award to Z4.

B. GSA is Estopped From Requiring the Submission of the Performance Bond Because Z4 Justifiably Relied on the Silence of the GDOE

GSA is in agreement that Z4 timely requested an extension to submit the performance bond. *See* Agency Report at p. 1. GSA is also in agreement that Z4 submitted documentation from Alpha insurers demonstrating that *the performance bond had been approved*. Agency Report, Exhibit 14. Further, GSA does not argue, because it cannot, that the GDOE ever insisted that Z4 submit the performance bond or otherwise instructed Z4 that the request for an extension would not be accepted. Rather, the GDOE simply acquiesced to the reasonable request of Z4 for the extension. Accordingly, GSA is

now estopped from denying Z4 the extension to submit the performance bond because **Z4** *justifiably relied on the silence of the GDOE* that the extension would be granted. See 31 C.J.S. *Estoppel and Waiver* § 124 (“Mere silence will not raise an estoppel; but one who remains silent when it is his or her duty to speak thereby inducing another to act to his or her prejudice may be estopped.”).

II.

IT IS IN THE BEST INTERESTS OF GUAM TO AWARD THE IFB TO Z4

It is in the best interests of Guam for the OPA to re-affirm the award of the IFB to Z4, because Eons has failed to demonstrate that it can offer the products and services required by the IFB at a lower price than Z4. While Eons has submitted an Alternate bid with a lower price than Z4’s Basic bid, Eons has repeatedly failed to support these supposed cost savings. Instead of requiring supporting documentation, GSA simply requested Eons provide its unsubstantiated assurances that the Alternate bid meets the specification of the IFB. Needless to say, such procurement practices are not in the best interests of Guam.

Disregarding the full explanation requirement of the IFB and awarding the IFB to Eons will inevitably result in added costs to the Territory. As held by TRMA, Eons Alternate bid contains several products which are unacceptable for use on Guam. The “unacceptable” and cheap alternatives offered in Eons’ Alternate bid cannot withstand Guam’s climate will require early replacement. For example, TRMA disapproved of Eons’ use of the cheap substituted product for roof coating because “past experience with silicones has shown that they break down quickly under Guam UV conditions.” See

Agency Report, Exhibit 22. In addition, the “unacceptable” cheap shutter door offered in Eons’ Alternate bid “is grossly undersized for Guam wind load conditions.” Accordingly, this product will likely fail after the next typhoon. Therefore, these products will inevitably result in added cost to the Territory.

At what cost should GSA accept this project? Affirming the award to Z4 will not result in added out of pocket expense as the funds have already been approved and appropriated from the Capital Improvement Fund. The OPA should not award the IFB to Eons because Eons has repeatedly demonstrated that it cannot offer the materials and services required by this project at a lower price than Z4.

CONCLUSION

Eons has continually failed to fully explain the products and services offered in the Alternate bid. Accordingly, TRMA repeatedly held that the information submitted by Eons was “inadequate” and the products offered in the Alternate bid were “unacceptable.” Accordingly, Eons’ Alternate bid was properly rejected for failing to comply with the specifications of the IFB. Therefore, Z4 respectfully requests the OPA affirm the award made to Z4 and GRANT the appeal.

Submitted this 29th day of December, 2009.

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By 

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